1st defendant failed to do so. See *Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte. Ltd* [1994] 2 CLJ 6 SC.

Therefore as against the 1st defendant there will be judgment for the plaintiff for damages to be assessed and the damages shall be the market value of the two houses, with individual unencumbered titles, as on 23 November 1989 and which the Senior Assistant Registrar, upon motion by the plaintiff, shall assess after hearing evidence relating thereto. There will also be cost and statutory interest from the date the Senior Assistant Registrar shall have given judgment in respect of the said assessment of damages. The costs shall be at the scale of the Subordinate Courts if the amount of damages assessed shall be less than RM100,000.

As against the 2nd and 3rd defendants, there shall be judgment for the plaintiff for the sum of RM66,000 together with agreed interest at 1.5% per month from the 2 November 1989 until judgment and further stautory interest and costs at the scale of the Subordinate Courts.

In view of my ruling, the counterclaim of the 1st defendant is obviously unsustainable and I, in exercise of my inherent jurisdiction, order that the same be struck off.

WONG LEONG LANG

v.

TSENG CHOON CHIH @ TAY BAK HUI & 5 ORS.

HIGH COURT BORNEO, SIBU
TUAN HAJI MUHAMMAD KAMIL
BIN AWANG JC
[ORIGINATING SUMMONS 23/1993]
7 JANUARY 1994

LAND LAW: Section 178 Sarawak Land Code - Extension of caveats - Memoranda of acknowledgment and understanding executed - Developer to execute transfer of 2 sublots to plaintiff and plaintiff to pay developer upon delivery of titles - No transfer executed - Plaintiff lodging two caveats on land - No action filed - Caveats lapsing - Whether plaintiff had caveatable interest by virtue of the memoranda - Onus on plaintiff to prove - Sublots sold to third parties by developer - Allegation by plaintiff that sale and purchase a fraud to defeat his right - Whether any evidence of fraud - Plaintiff not pursuing claim for 7 years - Whether delay inordinate and inexcusable.

This was an application under s. 178 of the Sarawak Land Code for an extension of caveats in respect of two sublots.

The registered proprietors of the land entered into agreements for the development of the land with a developer. The land was divided into sublots and sublots Nos. 15 and 40 were alloted to the developer who built houses on the two sublots and sold them to two purchasers under a sale and purchase agreement. The developer had taken goods from the plaintiff and in consideration thereof he made two memoranda of acknowledgment and understanding on 4 November 1985 whereby the developer promised to execute a transfer of the two sublots to the plaintiff and the plaintiff promised to pay the developer RM20,000 upon delivery of the titles to the land. The titles were issued but no transfer nor payment was made. On 21 November 1985 the plaintiff lodged two caveats but no action was filed.

The issue before the Court was whether the plaintiff had acquired a claim to the title or a caveatable interest by virtue of the memoranda.

Held:

[1] The onus was on the plaintiff to prove that he had a caveatable interest. The caveator has to satisfy the Court that on the evidence his claim to an interest in the property raises a

serious question to be tried and that on a balance of convenience it would be better to maintain the *status quo* until the trial of the action.

[2] The plaintiff alleged that the sale and purchase agreement between the developer and the purchasers was a fraud to defeat his right but there was no evidence of fraud and misrepresentation. In fact the plaintiff had prior notice of the agreement of sale and despite that the memoranda was made. The plaintiff had not proved that he had a claim to the title or a right in the land. What the plaintiff had was a mere promise to do some act contained in the memoranda of understanding with the developer. A mere chose in action arising out of or incidental to a contract of sale of land cannot entitle the claimant to enter a caveat to freeze the land until his action has been heard. There must be an interest in the land.

[3] The plaintiff did absolutely nothing for 7 years since 4 December 1985. This was tantamount to an inordinate and inexcusable delay. The intention of the plaintiff was to keep alive a claim under the memoranda which had expired and the breach of which had been caused by the failure of the parties to complete it. In the circumstances, the Court disallowed the application with costs.

[Application dismissed with costs].

Cases referred to:
Tan Heng Poh v. Tan Boon Thong & Ors. [1992] 2 MLJ 1 (***refd***)
Hew Sook Ying v. Hiw Tin Hee [1992] 2 MLJ 189 (***refd***)
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 (***refd***)
Appoos/o Krishnan v. Ellamah d/o Ramasamy [1972] 2 MLJ 201 (***cit***)
Hiap Yiak Trading Sdn. Bhd. & Ors. v. Hong Soon Seng Sdn. Bhd. [1990] 2 MLJ 155 (***cit***)
Forward Metal Works Sdn. Bhd. v. Perbadanan Pembangunan Ekonomi Sarawak, Originating Motion No. KG. 7 of 1988 (unreported) (***refd***)
Teo Ai Choo v. Leong Sze Hian [1982] 2 MLJ 12 (***foll***)
Mawar Biru Sdn. Bhd. v. Lim Kai Chew & Anor. [1991] 2 MLJ 206 (***refd***)
Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors. [1986] 1 MLJ 315 (***refd***)

Legislation referred to:
National Land Code, s. 327
Sarawak Land Code (Cap. 81), ss. 173, 178

For the plaintiff - Belinda Hii; M/s. Hii & Hii
For the defendants - David Ting; M/s. Jaini Mardi & Associates

JUDGMENT

Haji Muhammad Kamil Bin Awang JC:
This is an application by way of an originating summons under s. 178 Land Code (Sarawak Cap. 81) for an extension of the caveats in respect of two pieces of land, sub-lots Nos. 15 and 40 of Block 4, Sungei Merah Town District, Sibu. The application is supported by four affidavits of the plaintiff and eleven affidavits in opposition of the defendants i.e. the proprietors of the land.

The registered proprietors of the land and one Sim Chui Peng (f) had entered into three successive agreements, *viz*. agreements dated 7 November 1978, 18 July 1981 and 21 November 1983 for the development of the land with Sie Chung Tung Housing Development Company (the "developer"). The land was divided into sublots, and sublots Nos. 15 and 40 were among the sublots allotted to the developer. The developer had built houses on these two sublots (i.e. sublots Nos. 15 and 40) and sold them to Wong Chung Ling and Hii Lick Ing for RM160,000 which purchase price was paid in full under a sale and purchase agreement dated 23 March 1985.

In the meanwhile, the developer had taken RM130,000 worth of goods from the plaintiff, and in consideration thereof, he on 4 November 1985 made two memoranda of acknowledgment and understanding (the "Memoranda") whereby the developer promised to execute a memorandum of transfer of sublots 15 and 40 to the plaintiff. In the same token the plaintiff promised to pay the developer a sum of RM20,000 upon the delivery of the titles of the land when issued by the Land & Survey Department, Sibu. The titles were issued on 6 November 1985 but there was no memorandum of transfer made nor the payment of RM20,000.

On 21 November 1985 the plaintiff lodged two caveats in the land, and waited. It proved to be a long wait as there was no action or suit filed. The caveats would lapse on the expiration of 3 months from the date of the notice served upon the caveator under s. 178 Land Code (Cap. 81), unless there is an order of the High Court giving an extension of the caveats. Hence the application by the plaintiff to this Court.

On the face of it this is an application for an extension of caveats. The question of paramount importance it raises, in my view, is

whether the plaintiff has acquired by the memoranda a claim to the a right thereto in the land. To put it in a nutshell, on 21 November 1985 when the caveats were lodged, the plaintiff should have been able to claim title to the land or a right to such title by virtue of the memoranda.

In order to file a caveat, the caveator must have a caveatble interest. What is a caveatable interest has been the subject of many decisions, some of the most recent ones, are Supreme Court cases in *Tan Heng Poh v. Tan Boon Thong & Ors.* [1992] 2 MLJ 1 and *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189. The onus of proof is on the caveator to satisfy the Court on the evidence to it.

The principle laid down by the Privy Council in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212, in an application to remove a private caveat under s. 327 of the National Land Code, has been consistently applied by the Courts in this country. This principle is equally applicable for the removal of a private caveat under the Land Code (Cap. 81). In order to succeed the caveator must establish two ingredients, failing which, the caveat will not be allowed to continue. Lord Diplock said at p. 215:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat: he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

The application in the present case is a bit unusual in that the plaintiff is not the registered proprietor, and he is claiming to protect his interest in a transaction which did not complete. What he has is a mere promise to do some act contained in memoranda of understanding with the developer. The caveator (plaintiff) is not a typical purchaser, and in my opinion, the real dispute is between the plaintiff and the developer, and not with the registered proprietors of the land.

The problem in this case is to identify the caveator's claim to title or registrable interest under s. 173 of the Land Code (Cap. 81). What is his caveatable claim? Although, Miss Hii, the learned Counsel for the plaintiff has submitted at length that the developer is a trustee for the proprietors, and therefore has the right to the land, there is a difficulty for the plaintiff to prove that he is entitled to a claim to the title or a right thereto in the land. In other words, will the plaintiff be able to get an order of specific performance of the contract between him and the developer. There is no action or suit brought against the developer since 4 November 1985.

The plaintiff is alleging that the sale and purchase agreement dated 23 March 1985 between the developer and the purchasers was a sham, meaning that it was a fraud perpetuated to defeat the plaintiff's right. She cited in support the case of *Appoo s/o Krishnan v. Ellamah d/o Ramasamy* [1972] 2 MLJ 201. There the plaintiff made an agreement with the defendant's husband, since deceased, whereby he acknowledged the receipt of RM2,500 from the deceased and agreed to execute a power of attorney for the transfer of the land belonging to him to the deceased. It was also agreed that if the sum is refunded before the prescribed date then the application to transfer the land would be withdrawn. The Court held that the plaintiff had proved fraud and misrepresentation on the part of the deceased, and that it was a loan transaction on the security of the land. Therefore the transaction was a moneylending transaction which was void and unenforceable under the moneylenders ordinance by reasons of illegality.

Another case cited by the learned Counsel for the plaintiff is *Hiap Yiak Trading Sdn. Bhd. & Ors. v. Hong Soon Seng Sdn. Bhd.* [1990] 2 MLJ 155. There the agreement for the alleged sale of a piece of land at a price of RM340,000 against the existing market value of RM700,000, and a clause therein provided for a refund of the price of RM340,000 plus a sum of RM100,000 as agreed compensation within a prescribed date. The Court was satisfied that this was not a genuine sale agreement.

With respect, these cases are not of much help to the plaintiff's case because in both cases the issue was adjudicated by the Court that agreements were not sale agreements.

In the present case, there is no evidence of fraud and misrepresentation proved in respect of the sale and purchase agreement between the developer and the purchasers. As a matter of

fact, the plaintiff had prior notice of the agreement of sale and despite that, the memoranda were made. Now that the caveats, by operation of law [i.e. the notice under s. 178 of Land Code (Cap. 81)] would lapse, the plaintiff had by evidence to demonstrate his claim to the title or a right thereto in the land. The plaintiff appeared not to have proved by the memoranda that he has a claim to the title or a right thereto in the land.

Another factor of paramount importance is the inordinate delay in which the plaintiff asserts his claim. There is no action or suit taken by the plaintiff in pursuing his claim. I do not think it is fair to the land proprietors to allow these caveats to be restored and to maintain the *status quo*. In *Forward Metal Works Sdn. Bhd. v. Perbadanan Pembangunan Ekonomi Sarawak*, Originating Motion No. KG.7 of 1988 (unreported), the Court held that undue delay on the part of the caveator is an additional ground for not making an order to maintain *status quo*.

The defendants' Counsel submitted that where the Court considers that the caveat should be removed on ground of delay, the fact that the caveator's claim is a claim to an interest or estate in land becomes a secondary matter. He cited the case of *Teo Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12 where the Singapore High Court citing *Plimmer Bros. v. St. Maur* [1906] 26 NZLR 294 where Stout CJ, on an application to remove a caveat, referred to several reported cases and said:

> It was his (caveator's) duty to commence an action promptly if he considered himself entitled to specific performance...Here nothing was done for nearly sixteen months, and then a caveat was lodged. More than a month has elapsed since then, and still no action has been commenced. In my opinion an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious...in my opinion, to prevent a man dealing in his property after such a long delay is so inequitable that the Court will not lend its assistance to such a proceeding.

In *Teo Ai Choo's* case, *supra*, a caveat was lodged 21 months after the sale and purchase agreement was executed. Eleven months later the plaintiff applied for removal of the caveat. The Court held that there was an "inordinate and inexcusable" delay and on the ground of delay alone the caveat must be removed.

In the present case, the two memoranda were signed on 4 November 1985 and individual documents of titles to sublots 15 and 40 were issued on 6 November 1985. On 4 December 1985 the plaintiffs' caveats were endorsed on the titles. The plaintiff did absolutely nothing since December 1985; a period of well over 7 years. This is tantamount to an inordinate and inexcusable delay. Although the *Teo Ai Choo's* case is of persuasive authority, I tend to accept it as authority on this point. This is supported by the view as expressed by Lord Diplock in the *Eng Mee Yong's* case, *supra*, at page 214:

> Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

Another point which is of equal importance, which must be mentioned here is that a mere chose in action arising out of or incidental to a contract of sale of land cannot entitle the claimant to enter a caveat willy nilly to freeze the land until his action has been heard. There must be an interest in the land. See *Mawar Biru Sdn. Bhd. v. Lim Kai Chew & Anor.* [1991] 2 MLJ 206 and *Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors.* [1986] 1 MLJ 315.

It is apparent from the evidence that the intention of the plaintiff is to keep alive a claim under the memoranda which had expired and the breach of which had been caused by the failure of the parties to complete it.

In the circumstances, and on the evidence adduced before this Court, I deem it unnecessary for me to deal with the other issues raised in this application, and I would disallow this application with costs.